IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-1347

THE MARTIN SWEETS COMPANY, INC. - Petitioner

versus

ROSE M. JACOBS - - - - - Respondent

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

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AUTHORITIES CITED

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BRIEF FOR RESPONDENT ROSE M. JACOBS IN OPPOSITION

The Respondent, Rose M. Jacobs (hereinafter referred to as "Jacobs"), opposes the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

COUNTERSTATEMENT

This case concerns the termination of one employee of a small corporation in Louisville, Kentucky, *because* she was pregnant and unmarried. The District Court concluded that Jacobs termination was a violation of

Section 703(a) of the 1964 Civil Rights Act, 42 U.S.C. 2000e-2(a), and she was awarded $7,500.00 in back pay (App. A of Petition, p. 21; App. E of Petition, p. 25).

The United States Court of Appeals for the Sixth Circuit affirmed and held that termination *because of* pregnancy has a disparate and invidious impact upon the female gender (App. B of Petition, p. 12). The opinion of the Sixth Circuit carefully sets forth the facts (App. A of Petition, pp. 4-9) and reaffirms the District Court's determination that the termination was because of pregnancy and not because of any premarital sexual activity (App. A of Petition, p. 13).

Contrary to the statement of the case presented by the Petitioner, the employer did not learn of any non-marital sexual activity by Jacobs, but learned of her pregnant condition only and terminated her for that reason. The record of the case is totally devoid of any evidence of how Jacobs became pregnant or of her non-marital activities, conduct, practices, or preferences, and certainly there is nothing in the record by which anyone could judge (rightly or wrongly) whether her conduct was ever improper or immoral.

REASONS FOR DENYING THE WRIT

I.

There Is No Factual Support In the Record For the Question Presented

The issue tried before the District Court on July 17, 1975, was whether Jacobs was terminated or constructively terminated from her position as Executive Secretary to the Vice-President of the corporation

because she was pregnant and unmarried. The Sweets Company denied that she was terminated for that reason, but both the District Court and the Court of Appeals have determined that her pregnancy was the basis for the termination.

The Sweets Company now attempts to change the issue. It says the question it wants the Supreme Court to decide is:

> Does a private employer violate Title VII of the Civil Rights Act of 1964 by terminating an unwed pregnant employee for *engaging in non-marital sexual activity of which the employer disapproves?* (Our emphasis.)

The factual record in this case does not present that issue. This was not and is not a sexual practice case at all. There is no evidence in the record of any sexual activity, not even one incident, by anyone associated with the case.

The question of whether a private employer can terminate employees for normal or exotic sexual activities of which he disapproves may be a question of some interest to some people, but it is not presented by this case.

Counsel for Jacobs has neither a desire nor an intention to be frivolous, but for all the record in this case discloses, Jacobs could have become pregnant as a result of artificial insemination. Other possible obviously moral methods by which an unmarried female can become pregnant are set forth in *Andrews* v. *Drew Municipal Separate School District,* 507 F. 2d 611, 615 (5th Cir., 1975). The alleged morality of a policy of

terminating unmarried pregnant female employees is also rationally and reasonably questioned in that opinion.

This Court is a court of law and decides legal issues of great national importance presented to it by an adequate factual record to sharpen and illuminate the issues. The issue which Sweets Company asks this Court to decide is simply not factually before the Court.

II.

The Decisions Below Are Clearly Correct; There Is No Conflict Of Decisions

There are few reported cases which have considered the exact question which was presented to the District Court and the Court of Appeals, but those where the issue has been squarely presented are in accord with the decision in this case and were relied upon by the District Court. *Doe* v. *Osteopathic Hospital of Wichita,* 333 F. Supp. 1357 (D. Kans., 1971) and *Andrews* v. *Drew School District,* 371 F. Supp. 27 (N.D., Miss., 1973). As the Sixth Circuit concluded, the facts of the only case which appears to be *contra* are substantially different. *Wardlaw* v. *Austin School District,* 10 FEP Cases 892 (W.D., Tex., 1975).

The only two Circuits which have considered the legality of the termination or the refusal to hire unmarried pregnant employees have agreed that such a policy and practice is unlawful under both Title VII and the Fourteenth Amendment.

Further, this Court has recognized that maternity policies directly affect "one of the basic civil rights of

man." *Cleveland Board of Education* v. *La Fleur,* 414 U. S. 632, 640 (1974). Employees should not be required to choose between such basic rights as employment and maternity. *Truax* v. *Raich,* 239 U. S. 33, 34 (1915).

Those pregnancy issues which were not resolved by this Court in *General Electric Company* v. *Gilbert,* 429 U. S. ——, 97 S. Ct. 401, 50 L. Ed. 2d 343 (1976), should be resolved by this Court in *Nashville Gas Co.* v. *Satty,* No. 75-536, *certiorari granted,* January 25, 1977; and *Richmond Unified School District* v. *Berg,* No. 75-1069, *certiorari granted,* January 25, 1977, and nothing would be added to those decisions by a grant of *certiorari* in this small case and consideration of this case would be a waste of the Court's valuable time and resources.

CONCLUSION

For the foregoing reasons, respondent, Rose M. Jacobs, submits that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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